

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**



368

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 22,372

UNITED STATES OF AMERICA

vs.

THEODOUS MCNAIR

Appellant

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APPEAL FROM JUDGMENT OF THE  
UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals  
for the District of Columbia Circuit

**FILED** APR 7, 1969

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STATEMENT OF QUESTIONS PRESENTED

1. Was there prejudicial and harmful error for the record not to show affirmatively that the defendant was present when the jury asked for additional instructions?
2. Was the admission of a lineup identification made immediately prior to the trial which was more than one year after the defendant was arrested unduly prejudicial to defendant and in violation of the due process clause of the Fifth Amendment of United States Constitution?
3. Was there insufficient evidence to enable the jury to find the defendant guilty beyond a reasonable doubt?

The pending case has not previously been before this Court.



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UNITED STATES COURT OF APPEALS  
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No. 22,372

UNITED STATES OF AMERICA

vs.

THEODOUS McNAIR

Appellant

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JURISDICTIONAL STATEMENT

Theodous McNair, the appellant, was convicted in the United States District Court for the District of Columbia for violating D. C. Code (1961) Sec. 22-2901, Robbery, and D. C. Code (1961) Sec. 22-502, Assault with a Dangerous Weapon. The District Court had jurisdiction to try the appellant for such offense, 18 USC 323.

Judgment of conviction was entered on June 28, 1968 and appellant's motion for leave to prosecute on appeal without prepayment of costs was granted on August 22, 1968.

This Court has jurisdiction upon appeal to review the judgment of the District Court under 28 USC 1291.

STATEMENT OF THE CASE

On December 5, 1966 the complainant, Max Silverman, left his store on 7th Street, N.W., Washington, D.C. carrying a box containing approximately \$4,000 in cash, with the intention of making a deposit of the money in a bank on 4th Street, N.E., Washington, D.C. (TR. 82-83). The complainant testified that after he walked into a 7th Street parking lot to get his car, a man walked up to him in the middle of the parking lot, stuck a gun in his ribs and demanded the box of money. (TR. 82) As the complainant raised his hands the gun went off (TR. 83). Following the discharge of the gun, the assailant struck the complainant on the head with the gun (TR. 84), grabbed the box, and ran away (TR. 84). The complainant testified that the confrontation lasted only about a half a minute (TR. 84).

On Sunday, May 14, 1967, complainant identified the defendant, Theodous McNair, as his assailant (TR. 149) from a series of eight photographs shown to him by the Robbery Squad of the Metropolitan Police Department (TR.147).

On the date of trial, May 22, 1968, complainant identified the defendant as his assailant at a lineup proceeding in the Court room immediately prior to the Trial (TR. 40-41).



STATEMENT OF POINTS ON APPEAL

1. The record does not affirmatively show that the defendant was present when the jury asked for additional instructions which error was prejudicial and harmful to the defendant.
2. The admissibility of a lineup identification immediately prior to the trial which was more than one year after the defendant was arrested was unduly prejudicial to the defendant and in violation of the due process clause of the 5th Amendment of the United States Constitution.
3. There was insufficient evidence to enable the jury to find the defendant guilty beyond a reasonable doubt.

## ARGUMENTS

### I

The failure of the record to affirmatively show that the defendant was present when the jury asked for additional instructions was prejudicial to the defendant.

It is a leading principle in criminal law that after an indictment, nothing shall be done in the absence of the accused. Furthermore, where personal presence is necessary in point of law, the record must show the fact. Lewis v. U.S., 146 U.S. 370, 13 S.Ct. 135, 36 L.Ed. 1011 (1892). It has also been determined that the rule of presence is required when additional instructions are given to the jury after submission of the case. Shields v. U.S., 273 U.S. 583, 47 S.Ct. 473, 71 L.Ed. 787 (1927). The substance of these rules is now incorporated in Rule 43 of the Federal Rules of Criminal Procedure.

In the instant case, after the jury had been given the case, a note was sent to the Court requesting information as to when the colored picture of McNair used in the photographic identification had been taken. (TR.256) The record does not show that the defendant was present when the additional instruction was given.

The case of Walker v. U.S., 116 U.S.App.D.C. 221, 322 F2d 434 (1963) holds that the non voluntary absence of the defendant does not require a reversal if the record shows with reasonable

certainly that such absence did not prejudice the defendant's substantial rights. In Walker the court determined that the communication had no tendency to influence the verdict against the defendant since the note involved his co-defendants. In the case at bar, the question asked by the jury involved the identification evidence upon which the prosecution based its case. It is clear that the absence of the defendant in such a situation is prejudicial since, unlike the Walker case, the question directly concerned the defendant.

A question of law asked by a jury in the form of an additional instruction in the absence of the defendant is not per se prejudicial and therefore, not reversible error :Estes v. U.S., (C.A. 10), 335 F.2d 609 (1964). However, the communication in the McNair case does not involve a question of law but one of fact and the defendant should have been present in order to aid in his defense. The additional communications between the Court and jury in the absence of defendant clearly concerned the defendant and had a tendency to influence the verdict against him. Walker v. U. S., Supra.

Since the conviction of the defendant is based on the evidence of a photographic identification, his absence during the communication involving this evidence affected the substantial right of the defendant and was thereby reversible error.

## II

The use of the lineup identification immediately prior to the beginning of the trial for the defendant (TR. 41) and the subsequent admission of such pre-trial identification (TR. 86-87) was prejudicial as it was in violation of the requirements for due process of law of the Fifth Amendment of the United States Consitution. The Appellant was arrested in May of 1967 after the victim identified him as his assailant. On May 21, 1968 prior to the trial, the defendant's counsel asked for a pre-trial lineup to take place within the Court room (TR. 41). The Government had a full year to conduct such a lineup to support the photographic identification of the defendant. However, no such lineup was held. The defendant's counsel was forced to conduct his own lineup to insure the credibility of the photographic identification and to protect the defendant from a tainted in-court identification. That the defendant had to hurriedly set up this procedure after the government had had ample opportunity to conduct such a lineup violated the fundamental concepts of fair play and the due process clause of the 5th Amendment of the U.S. Consitution. Stovall v. Denno, 388 US 293, 18 L. ed. 2d 1199, 87 S. Ct. 1967 (1967). The concept of fair play must also include the notion that the prosecution as well as the defense counsel must consider the rights of the accused. Rochin v. California, 342 US 165, 96 L.ed. 183, 72 S. Lt. 205 (1951).



Furthermore, the lineup identification prior to the trial was not conducted within a sterile vacuum. The complainant, though outside the Court room, may well have seen the defendant brought into the Court room under the supervision of the Marshalls, prior to the lineup identification, thus allowing the choice of the assailant to be pre-determined. The excitement of trial as manifested by ones nervous system may well have distinguished the defendant from the others in the lineup, thus affording unmistakable identification by the complainant despite the similarity of the lineup participants as to color, haircut, and dress (TR. 41). United States of America v. Wade, 388 US 213, 18 L. ed. 2d. 1143 87 S. Ct. 1326.

It was a violation of fundamental justice and in derogation of the due process clause of the Fifth Amendment to allow the complainant to testify that he had identified the defendant during a lineup in the Court room immediately prior to the trial since such a lineup was unfair and prejudicial to the defendant.

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### XII

The totality of the evidence was insufficient for a jury to have found the appellant guilty beyond a reasonable doubt.

The conviction in this case was based on photographic identification of the defendant by the complainant six months after the complainant had had a thirty second confrontation with his assailant.

The law requires that a jury is prohibited from convicting unless it can say that beyond a reasonable doubt the defendant is guilty as charged. Scurry v. United States of America, 120 U.S. App. D.C. 374, 347 F 2d 468 (1965).

Based on the facts in the case and the evidence of a brief confrontation between the complainant and assailant, a photographic identification more than six months later and a pre-trial lineup identification immediately before trial and one year after the photographic identification, the jury could not have found that the defendant was guilty beyond a reasonable doubt.

### CONCLUSION

Wherefore it is respectfully submitted that the judgment of the District Court should be reversed and the case remanded for new trial.